

## Adoption of Administrative Procedures Governing Appeals

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**Requested Action:** Discuss and adopt final draft of document containing I. administrative procedures governing appeals, II. statutory provisions requiring other consistency reviews, and III. other forms of review or evaluation by the Council.

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### **Background**

**A. Statutory Mandate.** The Council's enabling legislation (the Sacramento-San Joaquin Delta Reform Act of 2009) provides for a process to ensure the consistency of state and local public agency actions with the Delta Plan (see Water Code sections 85225-85225.30). State and local agencies proposing to undertake a "covered action", as defined by Water Code section 850575, must prepare and file a consistency determination with the Council. Any person may challenge that consistency determination by bringing an appeal to the Council. The Council, in turn, must hold a hearing on the appeal and issue written findings, either denying the appeal or remanding the matter to the state or local agency for reconsideration of the proposed project based on the finding that the consistency determination is not supported by substantial evidence in the record before the agency.

The Delta Reform Act also provides a separate process in which the Council may hear appeals with regard to determinations by the Department of Fish and Game (DFG) that the Bay-Delta Conservation Plan (BDCP) has met the requirements of Water Code section 85320 (that focus on compliance with the Natural Community Conservation Planning Act and the California Environmental Quality Act) for inclusion in the Delta Plan.

Water Code section 85225.30 requires the Council to adopt administrative procedures governing appeals, which are exempt from the normal state rulemaking process.

**B. Council Review of Prior Drafts.** At its June meeting, the Council reviewed a first draft of the appeals procedures and provided direction for issues to be addressed in a second draft for the July meeting.

At its July meeting, the Council reviewed a second draft that was recast into three separate parts.

Part I contains the administrative procedures governing appeals reviewed by the Council in June, revised to clarify, among other things, issues related to early

consultation, filing of the certification of consistency and the administrative record, and possible augmentation of the record by the Council.

Part II contains various statutory provisions found in SB X7 1 requiring other consistency reviews by the Council (after adoption of the Delta Plan), which are outside the scope of the normal procedures covered by Part I. This includes review of the Delta Protection Commission's Economic Sustainability Plan, and certain local and regional transportation planning documents, including sustainable communities strategies and alternative planning strategies.

Part III lists other forms of review or evaluation by the Council, both before and after adoption of the Delta Plan—in essence, a listing of other services offered by the Council and its staff to assist agencies in complying with the Delta Reform Act. This includes consultation with interested parties regarding the interim plan, and with project proponents regarding potential “covered actions.” It also includes, subject to available resources, mediation of relevant disputes upon the request of interested parties, including disputes over whether a project constitutes a “covered action”.

The second draft was included in Appendix I to the Second Draft of the Interim Plan, which was sent by staff to more than 215 local agencies in advance of the Council's July meeting. [The first draft of the Appeals Procedures had been similarly included in an appendix to the First Draft of the Interim Plan.]

Following staff presentation, board discussion, and public comment on the second draft at the July meeting, the Council directed staff to meet with representatives from the five Delta counties to discuss their concerns prior to preparation of the third and final draft for adoption at the August meeting.

### **C. Meeting with the Five Delta Counties and Preparation of Final Draft**

**Recommended For Adoption.** As directed by the Council, staff met with representatives from the five Delta counties on Thursday, August 5, at the Council's offices in Sacramento. The meeting was attended either in person or by teleconference by county counsel, resource agency, and other representatives from the five delta counties, as well as Council staff and their technical advisers from the AG's office. At staff's request, the counties sent detailed comment letters ahead of the meeting to focus the discussion.

Following the meeting, staff prepared a third and final draft of the document, which is attached (in “track changes” format to show changes from the second draft) and recommended for adoption by the Council at its August meeting. It addresses the delta counties' major concerns with the previous draft (almost entirely focused on Part I, the Appeals Procedures), including the mandatory nature of early consultations and public posting of draft certifications; the requirement to file an administrative record even if no appeal is filed; and the broad authority to augment the submitted record, even when it is certified as “full and complete.” At the same time, staff believes that the third draft

preserves the Council's ability to obtain necessary information and process and decide appeals in a timely and effective manner.

Representatives from the five Delta counties have reviewed the revised third draft, and have expressed support for adoption by the Council. They have also indicated that they will attempt to submit a letter of support from the principals of the Five Delta County Coalition ahead of the Council's August meeting.

**D. Other Issues.** The State and Federal Contractors Water Agency testified at the July meeting, and followed up with a comment letter dated July 28, 2010, regarding the standard of review to be used by the Council upon appeal of a determination by the Department of Fish and Game that the BDCP meets the requirements of Water Code section 85320 (see Paragraph 23 of the Appeals Procedures). They suggested that the appropriate standard should not be "de novo" (in essence, taking a fresh look at all the applicable law and facts), which was implied but not expressly stated in the second draft. Instead, they suggested as appropriate a more limited, deferential review of DFG's determination (similar to the "substantial evidence" standard to be employed upon appeal of covered actions). Staff considered the suggestion, but believes that if the Legislature had intended a more deferential review of the DFG decision, it would have expressly stated so, as it did in the Delta Reform Act with regard to appeals of covered actions. Consequently, staff has not incorporated this suggested change, and has clarified in Paragraph 23 that the standard of review with regard to a BDCP appeal is "de novo."

Some Delta counties had suggested that the provisions for BDCP appeals be expanded to ensure transparency of DFG's determination and the Council's disposition of the appeal. They also suggested that the Council enter into MOUs with DFG and DWR to clarify ahead of any appeal the logistics for interagency cooperation in this regard. Staff has begun preliminary discussions with DFG about the provisions of a possible MOU covering this and other Delta Reform Act implementation issues. It intends to do the same with DWR.

With regard to ensuring the transparency of DFG's BDCP determination and the opportunity for public input, staff notes that the revised third draft, in addition to providing for "de novo" review (based upon an independent review of all applicable law and facts), allows the Council to request from DFG (as well as the appellant) any information necessary to clarify, amplify, correct, or supplement information submitted with the appeal (Paragraph 21). Moreover, the Council is statutorily required to hold at least one public hearing concerning the incorporation of the BDCP into the Delta Plan, if DFG approves the BDCP as a natural community conservation plan (Water Code section 85320(d)). Consequently, staff believes there will be sufficient transparency and opportunity for public input under these procedures and in connection with any public hearing required in this regard.

Finally, some Delta counties had recommended a public outreach effort regarding the appeals process as the Council gets closer to adopting a Delta Plan, including one or

more workshops to assist state and local agencies incorporate this new process into their existing planning and approval processes. Staff supports this recommendation, and will work with affected agencies to explore potential options as preparation of the Delta Plan moves forward.

### **List of Attachments**

Attachment 1 - Final Draft Document [8/12/10] containing, "I. Administrative Procedures Governing Appeals; II. Statutory Provisions Requiring Other Consistency Reviews; and III. Other Forms of Review or Evaluation by the Council"

Attachment 2 - Final Draft Document [8/12/10] containing, "I. Administrative Procedures Governing Appeals; II. Statutory Provisions Requiring Other Consistency Reviews; and III. Other Forms of Review or Evaluation by the Council", Redline Version

### **Contact**

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